In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1305

VILIS MARTINS LAPENIEKS, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 389 F. 2d 343. The opinion of the district court is reported at 249 F. Supp. 398.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 1968. The petition for a writ of certiorari was filed on April 10, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 315(a) of the Immigration and Nationality Act, 8 U.S.C. 1426(a), provides:

(a) Notwithstanding the provisions of section 405(b) of this Act, any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.

QUESTION PRESENTED

Whether a resident alien who applies for and receives an exemption from military service as a treaty alien, whose exemption is subsequently withdrawn by the government and who is then rejected for military service as physically unfit, is ineligible to become a citizen of the United States.

STATEMENT

On December 6, 1965, the United States District Court for the Southern District of California entered an order denying petitioner's petition for naturalization. The court of appeals, by a divided vote, affirmed.

Petitioner was born in Riga, Latvia on November 10, 1931, and was admitted to the United States for permanent residence on January 21, 1952 (R. 10, 13; C.T. 2; Ex. 3; Ex. 4).[1] He registered with the local Selective Service Board in Miami, Florida, on August 5, 1952 (R. 20, Ex. 4). On October 23, 1952, he was classified I-A and ordered to report for a physical

[1] References are to reporter's transcript of proceedings ("R."), the clerk's transcript of record ("C.T.") and the exhibits ("Ex."). Petitioner's exhibits were designated by letters; those of the Immigration and Naturalization Service were designated by numbers.

examination on November 17, 1952 (R. 25; Ex. 4). On November 17, 1952, petitioner wrote his local draft board a letter reciting that he was a citizen of the Latvian Republic and requesting that he be exempted from the draft and given a IV–C reclassification (R. 23; C.T. 2; Ex. B). Three days later, on November 20, 1952, petitioner was reclassified in accordance with his request and the order to report for a pre-induction physical examination was cancelled (R. 25; Ex. 2; Ex. C).

About one month later, on December 24, 1952, the Immigration and Nationality Act of 1952 became effective. On April 24, 1953, the Selective Service System amended Local Board Memorandum No. 39 to require a personally signed application by a treaty alien for exemption from military service upon personal notice to the alien that under Section 315 of the Immigration and Nationality Act he would thereafter be permanently debarred from obtaining citizenship. Petitioner's local draft board accordingly sent him a letter, dated June 8, 1953, which quoted from the provisions of Section 315 and then stated:

> We are advising you of the above provisions of the law in order that you may place in your file conclusive evidence as to whether or not you personally desire exemption from military service in the armed forces of the United States since such exemption will permanently bar you from becoming a citizen of the United States. Please indicate your decision in the space provided below, adding your signature, and return one copy of this form to the local board within five days (C.T. 3; Ex. 1; Ex. 0).

On June 16, 1953, petitioner adopted the following statement appearing in the notice: "Having full knowledge of the above facts, I wish to be exempt from military service in the armed forces of the United States." He signed the statement and returned the letter to his local draft board (C.T. 3; Ex. 1).

On February 17, 1956, Executive Order No. 10659, 21 Fed. Reg. 1079, 1082, withdrew the right of permanent resident aliens to claim exemptions of the kind asserted by petitioner.[2] On April 11, 1957, petitioner was once again classified I–A (R. 26, 29, 33; Ex. 4; Ex. E), but on October 10, 1957, he was rejected for military service following a physical examination and was reclassified IV–F (R. 34–37; Ex. 4).

On September 6, 1963, petitioner filed his petition for naturalization in the district court. The Immigration and Naturalization Service opposed the petition on the ground that petitioner had rendered himself ineligible for naturalization because of the provisions of Section 315 of the Immigration and Nationality Act.

ARGUMENT

This Court, in *Ceballos* v. *Shaughnessy*, 352 U.S. 599, 606, held that "Section 315 of the 1952 Act enacts a two-pronged requirement for the determination of permanent ineligibility for citizenship: the alien must be one 'who applies or has applied for exemption,' and also one who 'is or was relieved or discharged from

[2] In 1951, Section 4(a) of the Universal Military Training and Service Act had amended the Selective Service Act of 1948 to make "every male alien admitted for permanent residence" liable for military service (65 Stat. 75, 76, 50 U.S.C. App. 454).

such training or service on such ground." In the instant case petitioner's situation clearly satisfies the first prong of this test, for it is undenied that he knowingly sought and actually received an exemption from military service as an alien. Nor can it be denied that petitioner's IV–C classification effectively relieved him being called to serve in the armed forces for a period of four years. In these circumstances, if the statute is to be applied as it is written, it is apparently immaterial that the exemption was later withdrawn, and that, when called for service, petitioner was rejected because of a physical disability. The statute provides no qualification on the barrier to citizenship.

Since petitioner elected to assert his privilege as a treaty alien to be exempted from the draft in 1952 it is impossible to determine whether he would otherwise have been found physically fit for military service at that time. If, as is possible, the disqualifying physical condition detected in 1957 developed between 1952 and 1957, petitioner's claim of the alien exemption effectively afforded him not only a temporary but a permanent exemption from the draft. In any event petitioner knowingly, deliberately, and explicitly chose disqualification from citizenship in order to avoid the possibility of being drafted. This is what Section 315 provides as precluding a subsequent application for citizenship. Petitioner must now bear the legal responsibility for his choice.

Petitioner recognizes (Pet. 6) that there is no conflict among the circuits, and in fact the decision below is in accord with that of every court of appeals which has passed upon this precise question. *In Re Naturaliza-*

tion of Cuozzo, 235 F. 2d 184 (C.A. 3); *United States* v. *Kenny*, 247 F. 2d 139 (C.A. 2); *In Re Skender's Petition*, 248 F. 2d 92 (C.A. 2), certiorari denied, 355 U.S. 931. Petitioner's reliance on *United States* v. *Hoellger*, 273 F. 2d 760 (C.A. 2), *Cannon* v. *United States*, 288 F. 2d 269 (C.A. 2), *In Re Rego's Petition*, 289 F. 2d 174 (C.A. 3), and *United States* v. *Lacher*, 299 F. 2d 919 (C.A. 9), is misplaced. In all of these cases the aliens actually served in the armed forces after the withdrawal of their aliens' exemptions; under such circumstances a court could reasonably find that they had not been effectively relieved from military service by their claim of exemption,[5] within the meaning of the statute. No similar considerations warrant the conclusion that petitioner should be relieved from the consequences of his choice; for all that can now be determined his claim for exemption did operate effectively to relieve him of amenability to the draft.

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[5] Indeed in *Hoellger*, *supra*, the court expressly stated in dictum: "An alien who postpones induction by means of application for exemption, and who is thereafter rejected for physical disability, may legitimately be said to have been relieved from military service by virtue of his exemption application." 273 F. 2d at 763 n. 2. In *Cannon*, *supra*, Judge Friendly, in dissent, indicated that he would have barred from citizenship under Section 315 an alien who received only a temporary exemption from service because of his alienage and who subsequently actually served in the armed forces. 288 F. 2d at 271–272.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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